

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FLYPAPER DISTRIBUTION, LLC,

Plaintiff,

V.

DOES 1 - 19,

Defendants.

Case No. C13-0063RAJ-RSL

ORDER OF DISMISSAL

This action was filed on January 9, 2013. Each of the Doe defendants is identified only by an IP address linked to the on-line sharing of the movie “Flypaper.” Plaintiff asserts direct and contributory copyright infringement claims against each Doe defendant. On February 12, 2013, the Court granted plaintiff’s motion to initiate early discovery from internet service providers in order to obtain information sufficient to identify the owner of each IP address. None of the defendants was timely served (see Fed. R. Civ. P. 4(m)), nor has plaintiff amended its complaint to identify any of the Doe defendants.

After the matter had been pending for four months and the Court had heard from a number of putative defendants in other related cases, the Court issued an order to show cause acknowledging concerns regarding the propriety of joinder and the possibility that plaintiff was using the judicial authority of the United States to wrest improvident settlements from *pro se* litigants under threat of huge statutory penalties. The Court

1 stayed the above-captioned matter and required plaintiff to provide copies of all written
2 communications with the owners of the IP addresses, summaries of all oral
3 communications with those individuals, proof of Flypaper Distribution's ownership of the
4 copyright at issue, and the identification of all members/owners/stakeholders of Foresight
5 Unlimited, LLC. In addition, the Court ordered plaintiff to show cause why the case
6 should not be dismissed for improper joinder and/or for failure to timely serve. Having
7 reviewed plaintiff's response, the Court finds as follows:

8 **A. Joinder**

9 Federal Rule of Civil Procedure 20(a)(2) imposes two specific requirements
10 for the permissive joinder of defendants. First, the right to relief against defendants must
11 arise out of "the same transaction, occurrence, or series of transactions or occurrences."
12 Fed. R. Civ. P. 20(a)(2)(A). Second, there must be some question of law or fact common
13 to all defendants. Fed. R. Civ. P. 20(a)(2)(B). Taking the well-pled factual allegations of
14 the complaint as true and considering the declarations of plaintiff's investigator, the Court
15 finds that these requirements are easily met. As to each separate lawsuit, plaintiff's
16 investigator found that a user of the IP addresses identified in the action possessed a
17 pirated copy of "Flypaper," that each copy was a reproduction of the same original, and
18 that the user offered for download a portion of its pirated copy at the investigator's
19 request, contributing to a fully-playable version of the movie. Depending on how one
20 characterizes this activity, plaintiff's claims for relief arise from either the same
21 transaction (*i.e.*, its investigator's successful download of a single copy of "Flypaper") or
22 a related series of transactions (*i.e.*, the incremental downloads of portions of the movie
23 from each identified IP address). Litigating the cases will also involve common questions
24 of fact and/or law regarding the existence of a swarm, the alleged downloads, plaintiff's
25 ownership of the copyright, and the elements of infringement. The fact that persons
26 associated with the IP addresses may have individual defenses to plaintiff's claims does

1 not change the fact that there will be some common question of law or fact: not all of the
2 legal and factual issues must be identical as to all defendants. Patrick Collins, Inc. v.
3 Does 1-21, 282 F.R.D. 161, 168 (E.D. Mich. 2012).

4 Although the specific requirements of Rule 20 are met, the Court must also
5 determine whether permissive joinder will “comport with the principles of fundamental
6 fairness.” Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000). Factors
7 relevant to this determination include the possible prejudice to any party, delay caused by
8 joinder, the motives for joinder, the closeness of the relationship between the joined
9 parties, notice to the parties, and the effect of joinder on jurisdictional issues. Desert
10 Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980). In the Ninth
11 Circuit, “[w]e start with the premise that Rule 20 . . . is to be construed liberally in order
12 to promote trial convenience and to expedite the final determination of disputes, thereby
13 preventing multiple lawsuits.” League to Save Lake Tahoe v. Tahoe Reg’l Planning
14 Agency, 558 F.2d 914, 916-17 (9th Cir. 1977).

15 Jointly litigating the facts related to the swarm plaintiff has identified and
16 the legal issues related to infringement is more efficient for plaintiff and the Court than
17 litigating nineteen separate suits involving only one IP address each. In addition, the
18 nature of the swarm and the BitTorrent protocol, with its many pieces and multiple
19 sources, suggests that joint litigation may be necessary for plaintiff to substantiate its
20 theory that defendants acted in concert to download copyrighted material, even if the
21 segment downloaded from a particular defendant, considered alone, might not constitute
22 copyright infringement. Defendants, on the other hand, gain no appreciable advantage
23 through individual litigation: in either case, defendants will be able to offer individual
24 defenses to the allegations. Nor does there appear to be any significant risk of liability by

1 association.¹ Jointly litigating these claims also allows defendants, many of whom will
 2 undoubtedly proceed *pro se*, to pool resources, rely on arguments raised by other
 3 defendants, and/or benefit from the participation of retained counsel. The only potential
 4 advantage to severance appears to be the hope that plaintiff will give up its claims, no
 5 matter how meritorious, in the face of mounting costs. If, as the Court is willing to
 6 assume at this stage in the proceeding, plaintiff's allegations are true and its copyright has
 7 been infringed, such a result is neither just nor fair.

8 The Court further finds that there is no indication that joinder will impact
 9 the Court's subject matter jurisdiction and that defendants' alleged participation in a
 10 knowing and intentional file-sharing scheme constitutes interrelated acts justifying joint
 11 litigation even if defendants remained unaware of the identity of their fellow BitTorrent
 12 users.

13 The Court is, however, concerned about the impact that joinder has already
 14 had on the handling of this litigation and how that handling reflects on plaintiff's motives
 15 for amassing large groups of defendants. To be clear, the Court finds that joinder under
 16 Rule 20 for purposes of prosecuting copyright infringement claims against members of a
 17 swarm in a single lawsuit can be appropriate. Plaintiff, however, was not actually
 18 prosecuting this action.² Despite receiving identifying information regarding some of the
 19 individuals associated with the IP addresses at issue, plaintiff failed to affect service,
 20 asserting that complications in obtaining subscriber information regarding every IP

21 ¹ Contra Voltage Pictures, LLC v. Does 1-12, No. 2:13-292-AA, 2013 WL 1900597 (D. Or. May
 22 4, 2013) (finding availability of statutory damages and potential that unintentional infringers could be
 23 prejudiced by being sued along with original seeder and/or serial infringers precludes joinder).

24 ² In response to the various orders to show cause issued in this and the related copyright
 25 infringement cases, counsel provided virtually identical memoranda and declarations, making it
 26 impossible to determine exactly what steps plaintiff took to prosecute this particular action or what
 communications were had with one or more of the nineteen Doe defendants. The Court will therefore
 assume that counsel took the exact same steps and engaged in the same types of communications with
 regards to all of the pending cases.

1 address somehow prevented it from naming any individual defendants. This approach to
2 litigation has caused delay and raises all sorts of potential for abuse, as discussed more
3 fully below. In addition, the failure to prosecute the actions suggests that the motive for
4 joinder is not to promote the underlying goals of efficiency, justice, and expeditious
5 resolution of the disputes, but rather to use the pendency of this litigation to obtain
6 unilateral discovery regarding non-parties and to push for quick (and potentially
7 unjustified) settlements.

8 In the circumstances of this litigation, the Court finds that joint litigation
9 against numerous participants in a single swarm satisfies the specific requirements of
10 Rule 20(a)(2) but that, as utilized by plaintiff, the joinder actually retarded the litigation
11 and does not comport with the principles of fundamental fairness.

12 **B. Lack of Service**

13 Pursuant to Fed. R. Civ. P. 4(m), “[i]f a defendant is not served within 120
14 days after the complaint is filed, the court – on motion or on its own after notice to the
15 plaintiff – must dismiss the action without prejudice against that defendant or order that
16 service be made within a specified time.” The complaint was filed in the above-captioned
17 matter on January 9, 2013. Plaintiff waited three weeks to request permission to conduct
18 discovery from the internet service providers, which the Court granted eleven days later.
19 No proofs of service were filed (as required by Rule 4(l)), and the Court ordered plaintiff
20 to show cause why the case should not be dismissed for failure to timely serve.

21 Rather than address the service issue in its response, plaintiff simply states
22 that it did not receive subscriber information from certain ISPs prior to the date on which
23 the Court quashed the subpoenas and stayed the cases. Plaintiff does not assert that the
24 ISPs were recalcitrant or otherwise refused to comply with the subpoena. On the existing
25 record, it is impossible to conclude that plaintiff acted diligently in seeking and pursuing
26 discovery in these matters or that good cause existed for the failure to comply with the

1 120-day service deadline.

2 Just as importantly, plaintiff offers no justification for its failure to timely
3 serve the defendants who have been identified. Plaintiff opted to leave those individuals
4 in limbo, knowing of this litigation but not yet a party. Predictably, individuals who
5 received notice of the lawsuit from their ISP began calling plaintiff's counsel who
6 apparently referred them to a webpage of "Frequently Asked Questions," invited them to
7 prove their innocence, and/or negotiated settlements. In addition, counsel sent demand
8 letters to a handful of defendants in these cases. Despite the Court's instruction, plaintiff
9 has not provided copies of the demand letters and has not summarized its oral offers of
10 settlement. The Court is therefore left to guess regarding the tenor and accuracy of
11 statements made to potential defendants. The little information available to the Court is
12 not reassuring.

13 Counsel's "educational FAQ website" is found at
14 www.fronteirlawgroup.wordpress.com and attached to this Order as Exhibit A. The first
15 question is "Why am I being sued?" Of course, the individual reading the FAQs has not
16 yet been sued, and plaintiff does nothing to clarify the procedural posture of the case. An
17 email string filed under seal in related cases shows that, even at the point of
18 consummating a settlement, the individual mistakenly believed that a case had been filed
19 against him or her. The second question is about the justification for the settlement
20 demand amount, but plaintiff has not provided any information regarding oral or written
21 settlement demands in the above-captioned matters. The FAQs themselves are silent on
22 this issue, although they do mention the maximum statutory penalties and a \$675,000 jury
23 verdict in a copyright infringement action in the District of Massachusetts. Plaintiff's
24 advice regarding the association of counsel (the court will not appoint counsel in a civil
25 suit) and the validity of possible defenses (failure to password protect and/or monitor the
26 use of your internet connection may constitute negligence) is suspect. Finally, plaintiff

1 invites the individual reading the FAQs to provide evidence proving that he or she did not
2 download “Flypaper.”

3 When plaintiff sought permission to conduct discovery in this case, it
4 represented the discovery as both limited and efficacious: by subpoenaing subscriber
5 identification information from the ISPs, plaintiff would be able to pursue these lawsuits
6 and protect its copyrights. It turns out, however, that identifying the account holder tells
7 us very little about who actually downloaded “Flypaper” using that IP address. As one
8 court noted, “it is no more likely that the subscriber to an IP address carried out a
9 particular computer function . . . than to say an individual who pays the telephone bill
10 made a specific telephone call.” In re BitTorrent Adult Film Copyright Infringement
11 Cases, 2012 WL 1570765, at *3 (E.D.N.Y. May 1, 2012). In fact, it is less likely. Home
12 wireless networks are ubiquitous, meaning that a single IP address can simultaneously
13 support multiple computer devices throughout the home and, if not secured, additional
14 devices operated by neighbors or passersby. Thus, the risk of false positives is very real.
15 Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 243 (S.D.N.Y. 2012). It is not clear that
16 plaintiff could, consistent with its obligations under Fed. R. Civ. P. 11, make factual
17 contentions regarding an internet subscriber’s infringing activities based solely on the fact
18 that he or she pays the internet bill. Plaintiff seems to be aware of this problem and has
19 refrained from identifying the Doe defendants more specifically even after it learns the
20 name of the subscriber. Plaintiff does not, however, take the appropriate steps of
21 returning to the Court to seek an extension of time in which to serve and permission to
22 conduct additional discovery. Rather, plaintiff demands that the subscriber prove he or
23 she did not download “Flypaper.” Therein lies the rub. Plaintiff has effectively obtained
24 access to unrepresented individuals and parleyed that access into open-ended and
25 unlimited discovery, despite the very narrow discovery order entered by the Court.

26 In this context, the 120-day service deadline is the only thing that limits

1 plaintiff's unsanctioned discovery expedition. If plaintiff feels it has enough information
2 to satisfy its Rule 11 requirements by simply identifying the subscriber associated with an
3 IP address, it should serve the complaint and initiate litigation subject to the limitations
4 imposed by the rules of civil procedure. If, on the other hand, plaintiff would have
5 trouble justifying a factual contention that the internet subscriber must, by virtue of that
6 fact, be the downloader, it should seek an extension of the service deadline by explaining
7 why it was unable to obtain the information in a timely manner and identifying steps to be
8 taken that would allow litigation to begin. If those steps include additional discovery,
9 further permission of the Court would be necessary. In short, plaintiff must actually
10 prosecute the claims it has asserted. Instead, plaintiff's litigation strategy seems to be to
11 use the mere pendency of this action to create a period of time in which it can scare
12 subscribers into settlement as the only means of avoiding both litigation costs and harsh
13 statutory penalties. The limited communications disclosed to the Court in this and other
14 related cases show that plaintiff makes every effort to "educate" the subscriber regarding
15 the statutory penalties he or she faces. Coupled with the clear implication that evidence
16 of IP address ownership is legally sufficient to establish copyright infringement and the
17 demand that the subscriber prove his or her innocence, it is not surprising that subscribers
18 – whether guilty or not – may choose to settle. While the risk of improvident settlements
19 and overreaching cannot be eradicated, the Court will not allow plaintiff to pick and
20 choose the procedural rules it likes while ignoring deadlines and discovery limitations.
21 Absent extraordinary and unforeseeable circumstances, the service deadline will be
22 strictly enforced in order to reduce the risk of overreaching.

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1 For all of the foregoing reasons, the above-captioned matters are
2 DISMISSED for improper joinder and failure to timely serve. The Court need not reach
3 issues regarding ownership of the copyright.

4

5 DATED this 5th day of August, 2013.

6

7 Robert S. Lasnik

8 Robert S. Lasnik
9 United States District Judge